**BEFORE THE APPEALS BOARD**
**FOR THE**
**KANSAS DIVISION OF WORKERS COMPENSATION**

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| **LEO NILGES** | ) | |
| Claimant | ) | |
| VS. | ) | |
| | ) | Docket Nos. 1,046,360 |
| | ) | & 1,046,362 |
| **STATE OF KANSAS** | ) | |
| Respondent | ) | |
| AND | ) | |
| | ) | |
| **STATE SELF-INSURANCE FUND** | ) | |
| Insurance Fund | ) | |

## ORDER

Claimant requests review of the August 24, 2009, preliminary hearing Order entered by Administrative Law Judge Kenneth J. Hursh.

## ISSUES

Claimant alleges two accidents at work. In Docket No. 1,046,360 claimant alleges he injured his upper back and right shoulder on April 21, 2008, when he slipped while climbing down from the bed of a dump truck. In Docket No. 1,046,362 claimant alleges he injured or aggravated his back and shoulder on January 15, 2009, when his chair collapsed at work.

Judge Hursh denied claimant benefits for the April 2008 accident after finding that respondent was not required to file an accident report with the Division of Workers Compensation and, therefore, claimant failed to establish he made timely written claim as the period was not extended from 200 days to one year. The Judge reasoned, in part:

> The question is whether these work interruptions [in claimant's work] amounted to whole or partial incapacity from labor or service. It is held that they did not. The claimant was not formally restricted by a physician from performing any of his job duties, nor was there any discussion with his employer about modifying job duties. The claimant simply kept coming to work and going out on his regular job assignments. The occasions where the claimant had difficulty performing a task were known only to the claimant and the co-worker with him at the time. Absent

> some understanding by both the claimant and respondent that he was not performing the usual expected labor, the claimant did not present an incapacity from labor or service that obligated the respondent to file an accident report.
>
> Also, missing work for chiropractor appointments did not reflect the claimant's capacity for labor, but rather his availability. The chiropractor's office was apparently open at the same time as the claimant's work hours. This caused the claimant to have to leave work, but he was still capable of working absent the scheduling conflict.
>
> The respondent in this case was not required to file an accident report, so the 200 day written claim time limit was not extended. The claimant failed to provide a written claim within 200 days of the injury, so proceedings may not be maintained under the workers compensation act.[1]

The Judge found the January 2009 accident was a minor event and produced only temporary effects. Consequently, the Judge denied claimant's requests for medical benefits and temporary total disability benefits in both claims.

Claimant maintains he gave timely written claim of his April 2008 accident in December 2008 when he was ultimately given an accident report to complete and referred for medical treatment. Claimant argues the period for providing written claim was extended to one year as his supervisor knew he was partially incapacitated from working. Furthermore, claimant contends he has proven the January 2009 accident aggravated his condition and there is no way to determine the permanency of that aggravation until medical treatment is completed. Accordingly, claimant requests the Board to reverse the August 24, 2009, Order, find both claims compensable, and find that he is entitled to receive both medical benefits and temporary total disability benefits.

Respondent argues the preliminary hearing Order should be affirmed. First, respondent contends it was not required to file an accident report for the April 2008 accident because claimant was not wholly or partially incapacitated for the remainder of that day or that shift. Consequently, respondent maintains the December 2008 written claim was untimely as it was not made within 200 days of the accident. Respondent concedes that claimant provided timely written claim if the period for providing written claim was extended to one year due to respondent's failure to file an accident report. Next, respondent argues the January 2009 accident did not injure claimant and, therefore, any medical treatment claimant may need is from the April 2008 accident.

The only issues presented to the Board on this appeal are:

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[1] ALJ Order (Aug. 24, 2009) at 3.

1. Was the period for providing written claim for workers compensation benefits extended to one year from the April 2008 accident?

2. Is claimant's present need for medical treatment from either his April 2008 or January 2009 accident?

## FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member finds:

Claimant is employed as an equipment operator by respondent and helps maintain its highways. There is no dispute that claimant injured his right shoulder and upper back at work on April 21, 2008, when he climbed up the side of a dump truck to fasten the lid to a water tank and his feet slipped. Claimant described the accident as follows:

> I had both my feet on top of the rear duals, luckily I had both hands on top of the bed, and my feet slipped out. And I knew my feet wasn't going to touch the ground, so I just hung on the best I could and tried to prevent my fall as much as I could.[2]

Claimant, who is 6'4" and around 280 pounds, experienced immediate pain in his right shoulder and within a couple of hours had spasms and pain in his upper back.

That day claimant reported the accident to his supervisor, Garrett Brandt. Moreover, claimant contends he requested an accident report be prepared. Mr. Brandt disagrees as he testified he prepares an accident report whenever an employee requests it or it is a serious injury and he can see the person is injured. On the other hand, Mr. Brandt acknowledges that claimant reported his April 2008 accident on the day it occurred. According to Mr. Brandt, claimant stated he did not want to see a doctor and did not want to file an accident report as he would "try to work it out."[3] But Mr. Brandt also testified that he estimates that within a month of the accident claimant came to him requesting to fill out the 1101A form, which was described as the form for workers compensation benefits.[4]

Despite the accident, claimant continued to work. Claimant's testimony that he had difficulty working overhead and lifting heavier items and, therefore, co-workers assisted him is corroborated by the testimony of co-worker Wesley Leisure. On May 2, 2008, claimant

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[2] P.H. Trans. at 11.

[3] Brandt Depo. at 23.

[4] *Id.*, at 18, 23, 24.

began seeking treatment from his chiropractor and sometimes missed work for those appointments. Claimant testified he advised his supervisor that he was obtaining treatment from the chiropractor for his upper back. Mr. Brandt admits he was aware that claimant was taking sick leave to attend appointments with the chiropractor and assumed it was for his back.

Eventually, in December 2008, claimant advised Mr. Brandt's supervisor about his accident and the need for an accident report. Respondent provided an accident report the next morning and claimant was promptly referred to Olathe Occupational Medicine Clinic for treatment. The parties agree the accident report was prepared and dated December 2, 2008. Likewise, respondent agrees that claimant made written claim for benefits within one year of the April 21, 2008, accident.

Claimant received therapy, underwent an MRI, and was eventually taken off work. Claimant testified his last day of work was June 8, 2009. Claimant was also referred to Dr. Adrian P. Jackson, who evaluated claimant in June 2009 before respondent denied responsibility and stopped providing treatment for claimant's injuries. According to Dr. Jackson's June 22, 2009, report, he diagnosed "[n]eck pain with interscapular pain/radiculopathy consistent with likely lower cervical spine disc herniations at least at C5-6 and C6-7."[5]

Meanwhile, on January 15, 2009, claimant experienced another accident at work when his chair broke and he landed on the concrete floor. Claimant's testimony is credible that the accident affected the pain in his upper back and right shoulder. When Dr. P. Brent Koprivica evaluated claimant in early August 2009 at the request of claimant's attorney and diagnosed two significant disk herniations in the cervical spine, the doctor also opined the April 2008 accident was of greater significance than claimant's January 2009 accident. The doctor wrote, in part:

> Currently, [claimant] presents with chronic cervicothoracic pain based on permanent aggravating injury to degenerative disease in the cervical region with the development of significant disk herniations at the C6-C7 level. Of the two work injury claims, I believe the April 1*[sic]*, 2008, injury is of greater significance than the injury of January 15, 2009, in terms of contributing to the current pathology and need for treatment.[6]

Dr. Koprivica recommended both restrictions and that claimant receive treatment from a neurosurgeon.

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[5] P.H. Trans., Cl. Ex. 3.

[6] *Id.*, Cl. Ex. 4 at 10.

Respondent does not challenge that the January 15, 2009, accident occurred or that claimant provided timely notice and timely written claim for that accident. But respondent vigorously disputes that claimant sustained any injury from that incident. Dr. Koprivica's report is presently the only medical evidence in the record that addresses claimant's January 15, 2009, accident.

The undersigned finds claimant's testimony is credible that he advised his supervisor that he was obtaining treatment from the chiropractor for his upper back symptoms. Claimant's testimony is also credible that as he continued to work he spoke with his supervisor about his ongoing symptoms approximately three times per month and the need for an accident report. Moreover, the undersigned finds claimant's testimony credible that he spoke with his supervisor about his continuing difficulties performing his work.

The record is not entirely clear regarding when Mr. Brandt submitted an accident report concerning claimant's April 2008 accident. Claimant testified an accident report was provided for him in December 2008 the day after he spoke to Mr. Brandt's supervisor. Mr. Brandt, however, testified he prepared an accident report electronically by accessing the form through the Kansas Department of Transportation (KDOT) web site and filling it in. Mr. Brandt did not testify the electronic document was printed and, thereby, transformed to paper. Mr. Brandt also initially estimated he prepared the report within a month of the April 21, 2008, accident. But he later testified he did not remember when he prepared the report. In any event, it appears claimant testified about a paper accident report form and Mr. Brandt testified about an electronic document. At this time it is unclear whether claimant and Mr. Brandt were talking about the same document or different documents or if it was filed.

In any event, the records of the Division of Workers Compensation indicate an accident report for the April 21, 2008, accident was filed with the Division on December 4, 2008.

## CONCLUSIONS OF LAW

As indicated above, respondent concedes claimant submitted timely written claim for the April 21, 2008, accident *if* respondent was required to submit an accident report as set forth in K.S.A. 44-557(a). That statute provides:

> It is hereby made the duty of every employer to make or cause to be made a report to the director of any accident, or claimed or alleged accident, to any employee which occurs in the course of the employee's employment and of which the employer or the employer's supervisor has knowledge, which report shall be made upon a form to be prepared by the director, within 28 days, after the receipt

> of such knowledge, if the personal injuries which are sustained by such accidents, are sufficient wholly or partially to incapacitate the person injured from labor or service for more than the remainder of the day, shift or turn on which such injuries were sustained.

And failure to file the accident report as required extends the period for providing written claim from 200 days to one year.[7]

There is no question that claimant's supervisor had knowledge of claimant's April 2008 accident. There is also no question that the supervisor had knowledge that claimant was using sick leave to see a chiropractor. And, as found above, the supervisor had knowledge claimant was having difficulty doing his job and that claimant was missing work to seek chiropractic treatment for the injuries he sustained in April 2008. That evidence establishes that claimant was partially incapacitated from labor and that such partial incapacity lasted longer than the remainder of the day and shift on which such injuries were sustained. Consequently, respondent was required by K.S.A. 44-557(a) to file an accident report. And the failure to file that accident report as set forth in K.S.A. 44-557(a) extended the period to make written claim to one year.

The next issue is whether claimant's workers compensation benefits should be provided in the claim for the April 2008 accident or the claim for the January 2009 accident. Dr. Koprivica is the only medical expert to comment on both accidents. The doctor clearly believed the April 2008 accident was the more significant in terms of claimant's present need for medical treatment. The undersigned agrees. Accordingly, the workers compensation benefits provided claimant should be provided in the claim for the April 2008 accident.

In conclusion, the August 24, 2009, Order should be reversed as claimant provided timely written claim for the April 2008 accident. In addition, claimant's benefits should be provided under the claim for the April 2008 accident.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[8] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

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[7] See K.S.A. 44-557(c).

[8] K.S.A. 44-534a.

**WHEREFORE**, the undersigned reverses the August 24, 2009, Order as claimant submitted timely written claim in Docket No. 1,046,360 and remands these claims to the Judge for further proceedings consistent with the above. The Board does not retain jurisdiction over these claims.

**IT IS SO ORDERED.**

Dated this ____ day of October, 2009.

KENTON D. WIRTH
BOARD MEMBER

c: Jan L. Fisher, Attorney for Claimant
Bryce D. Benedict, Attorney for Respondent and its Insurance Fund
Kenneth J. Hursh, Administrative Law Judge